Filed 2/16/05 In re A.S. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re A. S. et al., Persons Coming Under the Juvenile Court Law.	B174384/B175769 (Los Angeles County Super. Ct. No. CK43847)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent, v. F. B., Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Thomas E. Grodin, Juvenile Court Referee. Affirmed.

Michael A. Salazar, under appointment by the Court of Appeal, for Objector and Appellant.

Larry Cory, Assistant County Counsel, and Sterling Honea, Principal Deputy County Counsel, for Petitioner and Respondent.

INTRODUCTION

F.B. appeals from the orders of the juvenile court that terminated her parental rights over her sons T.D.B. and D.D.D. She contends the juvenile court erred in finding that the boys were adoptable and that the exceptions to adoption under Welfare and Institutions Code section 366.26,[1] subdivisions (c)(1)(B) and (c)(1)(E) did not apply. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

F. was the mother of four boys, A.S., T.D.B., D.D.D., and R.A.D. This is not the first time the family has come to the attention of the Department of Children and Family Services (the Department). The father of the D. children was convicted of sexually abusing a child and F. has been cited for child neglect. The order at issue only terminates her parental rights to T. and D., and so the other two boys are not parties to this appeal.

Fifteen-year-old A. was born with the umbilical cord wrapped around his neck. Since birth, he has had grand mal seizures, is profoundly mentally retarded, and essentially does not communicate. He requires complete care and supervision. A. does not maintain bladder or bowel control. He requires assistance in clothing, toileting, bathing, performing all grooming and hygiene activities. Although the child has a sweet demeanor, he is hyperactive and destroys property.

Twelve-year-old T. is mildly mentally retarded, and "severely emotionally disturbed." He exposes himself to children at school and uses profanity. D., who is nine years old, is also mildly mentally retarded. Although it is unclear from the record, the same may be true for R. who is eight years old.

F. is seriously mentally retarded, and has difficulty processing information. She reads at the second grade level, spells as a third grader, and her arithmetic skills are at the fifth grade level. Her daily living and social skills are approximately those of a 12-year-old.

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[1] All further statutory references are to the Welfare and Institutions Code.

F. pled no contest to a petition alleging, pursuant to section 300, subdivisions (b) and (g) that (1) she left the children in a home that was unsafe and unhealthy because there was no bedding or edible food, two windows were broken, and clothing was piled near a gas heater; (2) she has limited ability to deal with the unique behavioral or emotional problems of all four boys; (3) she has intellectual limitations that periodically render her unable to care for the children; (4) the father of the D. children has been convicted of sexually abusing a child; and (5) the whereabouts of the fathers of A. and T. are unknown and they have not provided for the children. All of these facts placed the children's physical and emotional health and safety at risk.

A. was placed in a group home. T., D., and R. were placed with Debra S.

Before conducting a disposition hearing, the court ordered F. to undergo a psychiatric evaluation. The court wanted an assessment of (1) F.'s ability to learn and understand parenting skills; (2) whether any underlying emotional or mental issue exists which might limit F.'s parenting; (3) the structure needed during visits with the children to protect them from risk; and (4) the counseling needed to address F.'s limitations to help her in reunification.

Michael P. Ward, Ph.D., the court-appointed expert, explained in his evaluation (Evid. Code, § 730) that F. was "clearly mentally retarded," and had never been given Regional Center services. F. explained that she has a " 'hard time figuring out stuff . . . . Like stuff [the psychologist was] trying to explain to me.' " F. stated that it is difficult for her to understand the social worker and what occurs in court. She did not understand what needed to be done for her children. It was likely that F. had not benefitted from reunification services in the past because the services had not taken into account her mental and verbal limitations. Dr. Ward stressed that most mildly retarded people are capable of being adequate parents, although they often require additional assistance, training, and supervision. Hence, mild mental retardation does not preclude the ability to adequately parent. Reunification would depend on the circumstances and condition of each of the children. The psychologist explained that it may be beyond F.'s capacity to

care for A., the most profoundly retarded of her children, or for T., who is seriously emotionally disturbed. The psychologist opined that once F. received appropriate services from the Regional Center to address the parenting of children with special needs, and assuming she benefited from those services, visitation could be significantly expanded.

In January 2001, the court ordered as the disposition plan, that F. receive reunification services to include individual counseling to address her "mental condition," parenting skills, and Regional Center services. F. was awarded unmonitored visits with her sons in their placements while the Department had discretion to liberalize the visits.

Debra had immediately began providing T., D., and R. with adequate care, a stable home, and the structure necessary for them to function well. The three boys showed an overall improvement in their behavior once they moved in with Debra, although some incidents warranted concern. F.'s therapist questioned F.'s decision-making ability and found her parenting skills to be significantly impaired because of her I.Q. As the result of their conditions, the boys needed consistent supervision. F.'s limited mental capabilities inhibited her ability to provide appropriate care to meet the children's special needs. At the section 366.21, subdivision (e) review hearing in July 2001, the juvenile court ordered six more months of services for T., D., and R.

In advance of the January 2002 review hearing held under section 366.21, subdivision (f), the Department reported that the three younger children were happy together and content living with Debra. Debra was willing to provide a home for the three as long as was needed. Although F. appeared engaged in her counseling, because she was not capable of providing for the children on her own, the Department opined it would not be in the children's best interest to be returned to her care. This situation was not aided by the fact that the D. father, who had been convicted of sexually molesting a child, wanted to help F. raise the children. The juvenile court extended reunification services for F. and D., T., and R. for another six months, and set the section 366.22 hearing for July 2002.

The Department reported in advance of the July 2002 hearing (§ 366.22) that the three boys functioned well under Debra's care. Debra was meeting the children's needs while providing them with a safe and stable environment. Meanwhile, F. had been evicted from her apartment and was living with a friend and her friend's four children in a one-bedroom apartment. F. had not been consistent in her visits. The D. father failed to complete a sexual abuser program and was in jail. Moreover, F.'s therapist indicated that F. was not benefiting from the counseling. According to the therapist, F. "lacks the insight to understand the purpose of treatment." Counseling was discontinued. The therapist stated repeatedly that F. would benefit from involvement with the Regional Center and classes on parenting skills and daily living. Upon the Department's recommendation, the juvenile court terminated reunification services for D., T., and R. in September 2002 and scheduled the section 366.26 hearing.

The Department analyzed the likelihood of adoption as a permanent plan for the boys. No adoptive parents or legal guardians had been identified for the three children. R.'s hyperactivity and constant need for supervision made it impossible for Debra to care for him. R. was removed from Debra's home. Once R. was placed with Edna L., his behavior improved. The social worker recommended that an effort be made to locate an appropriate adoptive family for R.

As for D. and T., Debra was not willing to adopt them or become their legal guardian. The Department wanted to have all three boys placed together because they had always been together. The boys were bonded, and the removal of R. had caused some stress. Because of their ages and the importance of maintaining sibling ties, the Department recommended adoption as the permanent plan. Although all three are developmentally delayed, the Department opined that once placed in a permanent home, their difficult behaviors would decrease.

In January 2003, the court found, based on the Department's report, that the children were "presently not adoptable." Finding no one to serve as legal guardian, the court ordered T., D., and R., into long-term foster care.

In March 2003, the Department reported that Debra had changed her mind and wished to become the legal guardian of T. and D. T. and D. stated they loved living with Debra, and wished to remain with her. The foster mothers facilitated visits between R. and his two brothers every other weekend. The children tried to maintain telephone contact. The social worker recommended, without terminating parental rights, that the court identify legal guardianship as the permanent plan for D. and T.

With respect to R., the Department explained, because it had not identified anyone willing or able to adopt him, that the Department would continue to provide permanent placement services under long-term foster care while exploring options for a more permanent plan. R.'s behavior had improved since his placement with Edna and he was feeling more comfortable. Edna stated that she would like to become R.'s legal guardian. One day, Edna stated, she might like to adopt R.

In June 2003, Debra decided to adopt T. and D. The Department opined that "[i]t is highly likely that the children T[.] and D[.] will be adopted by the current caregiver [Debra]. However, since the prospective adoptive parent recently decided to adopt the children, the Adoptive Home Study has not yet been initiated." Hence, the Department recommended that the juvenile court identify adoption as the permanent placement goal without terminating parental rights yet. The section 366.26 hearing was continued three times to enable proper notice, to allow for a contest, and twice on the recommendation of the Department to enable it to complete the adoptive home study.

In February 2004, the Department reported that the home study of Debra would be completed by April 2004.

In March 2004, the juvenile court granted Edna legal guardianship of R. The guardianship letters were signed and filed that same month.

On May 27, 2004, the Department informed the court that the adoptions' social worker had received the pending divorce decree for Debra, which had been holding up the approval. The adoptive home study would be submitted for approval on June 10, 2004, and would probably be approved at the end of June. Debra assured the social

worker that she was willing to work with Edna to ensure that the siblings maintained contact.

At the section 366.26 hearing held on May 27, 2004, the social worker, who had been assigned to this case for two years, testified that she recommended termination of parental rights so that T. and D. could be adopted by Debra. The social worker described T.'s behavior problems. T. is currently on medication for his attention deficit hyperactivity disorder and is defiant and aggressive at school, having gotten into fights with other children. T. receives counseling at the Regional Center. D. and T., who are mildly mentally retarded, stated once that they wanted to continue to see F., and on another occasion that they did not want to see her. D. initially shrugged his shoulders when asked where he wanted to live. Later, D. explained he wanted to remain with Debra. When asked by the social worker whether he understood adoption and if that was what he wanted, T., who is twelve years old, responded " '[y]es.' " T. understood adoption to mean that he would live with Debra who would be his mother. The social worker never explained to T. that adoption meant he would never see F. again.

The attorneys for T. and D. joined with the Department in requesting that F.'s parental rights be terminated. F. objected to the termination of her rights. At the close of the hearing, the juvenile court rejected the argument the children were not adoptable because of their special needs and the fact the home study was incomplete. The court observed that Debra "exhibited a very clear and unwavering" and "incredible" commitment to these boys. The boys have lived with Debra for nearly four years, which is almost half of D.'s life. Hence, "[s]o far as adoptability is concerned, it's not even a close call [that t]he children are adoptable." The juvenile court found no evidence to support the exceptions to adoption. After finding by clear and convincing evidence that the boys are adoptable, the juvenile court terminated parental rights. F. appealed.

CONTENTIONS

F. atrenda contends (1) there is insufficient evidence that the children would be adopted within a reasonable time; and (2) the juvenile court erred in finding the

exceptions to adoption in section 366.26, subdivisions (c)(1)(B) and (c)(1)(E) did not apply.

DISCUSSION

1. *Substantial evidence supports the court's finding by clear and convincing evidence that the boys are likely to be adopted.*

F. contends there is insufficient evidence to support the court's finding by clear and convincing evidence that the boys are likely to be adopted. F. argues that D. and T. require highly specialized care because of their developmental delays and emotional problems. She argues the "only certainty for the children, at the section 366.26 hearing, was that Debra S. and her husband were willing to adopt them." Yet, F. argues, the adoptive home study had not been completed by the time the court made its finding, with the result there was no evidence the boys were likely to be adopted within a *reasonable* time.

"The issue of adoptability posed in a section 366.26 hearing focuses on the *minor*, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]" (*In re Sarah M*. (1994) 22 Cal.App.4th 1642, 1649, original italics.) In addition, the court may consider the existence of a prospective adoptive family because such existence "generally indicates *the minor is likely to be adopted within a reasonable time* either by the prospective adoptive parent or by some other family. [Citation.]" (*Id*. at p. 1650, original italics deleted, italics added.)

On review from an adoptability finding, we determine whether the record contains substantial evidence from which the court could make its ruling by clear and convincing evidence. (*In re Christiano S*. (1997) 58 Cal.App.4th 1424, 1431.)

Here, the evidence supports the court's conclusion by clear and convincing evidence that the boys are likely to be adopted within a reasonable time. T. and D. have been thriving in Debra's care since the beginning of this dependency. D. is doing quite well, having reached his therapeutic goals. His teacher finds him a pleasure to have in

class, and although he is mildly mentally retarded, he appears to be doing fine. Otherwise, after nearly four years of raising these boys, coordinating their mental and physical care, and meeting their needs, Debra is fully aware of their developmental and emotional problems and continues in her wish to adopt them. The boys' physical condition and emotional state do not make it difficult to locate an adoptive parent because the Department has located one. (*In re Sarah M., supra,* 22 Cal.App.4th at p. 1650.)

While not determinative (*In re David H*. (1995) 33 Cal.App.4th 368, 378), the fact that D. and T. are living with an adoptive family who remains steadfast in its desire to adopt them is an important consideration in support of the court's adoptability finding. (*In re Sarah M., supra*, 22 Cal.App.4th at pp. 1649-1650.) The boys' placement with Debra is a success. The boys are adapting very well to their new home and are happy there. These facts militate in favor of adoptability here. That is, the fact D. and T. are living with this prospective adoptive family who continues to desire to adopt them *is evidence* that their age, physical condition, mental state, and other issues "are not likely to dissuade the individuals from adopting the minor." (*Ibid.*)[2]

F. cites the earlier finding that the boys were not adoptable, and the consequent order that they be placed in long-term foster care. From these facts, F. extrapolates, the court must have had a question about the children's adoptability if it wanted to delay the matter until the home study was complete. F. is concerned that as Debra's home study was not complete at the time of the section 366.26 hearing, T. and D. could be left

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[2] F. quotes from the court's statement in February 2004, when it continued the section 366.26 hearing to enable the adoptive home study to be completed. The court stated, "This is . . . a sensitive case. And [the Department] is correct. It's not technically, or not legally, good cause [to continue the hearing] if the home study is not finished. But on the other hand, the Court is going to find good cause in this particular case because of the unique nature of the issues that this case involves." F. suggests this is evidence that the court did not find the boys adoptable. But the court's finding of lack of "good cause" to continue the section 366.26 hearing is not a reflection on the adoptability of the children themselves; it is a question of whether the Department has made a legal showing meriting a continuance. The continuance was made at the request of *the Department* not sua sponte by the court.

without a prospective adoptive home while F.'s rights would be terminated. Where they have special emotional and developmental needs, she argues, they will not be otherwise adoptable.

However, it is not essential for a finding of adoptability that a child already be placed in a pre-adoptive placement. (*In re Sarah M., supra*, 22 Cal.App.4th at p. 1649.) Hence, while initially the Department recommended, and the court ordered long-term foster care, that is not *evidence* that the court's belief in its later adoptability findings was wavering; nor is it evidence that T. and D. are not, at this point, adoptable. Even if Debra's home study were to prove unsuccessful, as we have already explained, the fact that Debra wished to adopt D. and T. after living with them for four years *is in itself evidence* that the children are adoptable. (*Id.* at pp. 1649-1650.) Substantial evidence supports the adoptability finding. There was no error.

2. *The two exceptions to adoption cited by F. do not apply*.

The Legislature has declared adoption to be its preferred permanent plan. (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 573.) Once having determined a child may not be returned to the parent and is likely to be adopted, the juvenile court must select adoption as the permanent plan, unless it finds that termination of parental rights would be detrimental to the child under one of the five delineated exceptions. (*Id.* at p. 574; § 366.26, subds. (c)(1) & (c)(1)(A)–(c)(1)(E).) F. relies on the exception to adoption under section 366.26, subdivisions (c)(1)(B) and (c)(1)(E).

A. *The section 366.26, subdivision (c)(1)(B) exception*.

Turning to the first such exception, it applies when "[a] child 12 years of age or older objects to termination of parental rights." (§ 366.26, subd. (c)(1)(B).) F. argues that the evidence did not support the court's finding that this exception did not apply with the result the exception prevented termination of parental rights.

The record shows that the social worker discussed adoption with 12-year-old T. The child understood that adoption meant he "was going to live with [Debra]. [Debra] was going to be his mother." When asked if that was what he wanted, T. responded

" '[y]es.' " The juvenile court must " ' "consider the child's wishes to the extent ascertainable" ' " before terminating parental rights. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 820.) The evidence supports the court's finding that T. understood the concept of adoption, "as best as could be done" for someone of his age and mental limitations.

F. argues that when explaining to T. what "adoption" meant, the social worker "never addressed the specific statutory language of 'termination of parental rights.'. . ." Yet, " 'in considering the child's expression of preferences, it is *not required* that the child specifically understand the proceeding is in the nature of a termination of parental rights.' [Citation.]" (*In re Amanda D., supra,* 55 Cal.App.4th at p. 820, quoting from *In re Leo M*. (1993) 19 Cal.App.4th 1583, 1591.)

Next, F. argues the social worker never explained that adoption meant T. would never see F. again. We reject F.'s suggestion that the exception to adoption is negated by any possible failure to discuss whether T. would see F. again. Even had T. expressed a wish to maintain contact with F., it would not undermine his desire to be adopted. The two sentiments are not necessarily mutually exclusive. The evidence supports the juvenile court's finding that the exception to adoption in section 366.26, subdivision (c)(1)(B) did not apply to preclude adoption here.

Based on our above analysis, we reject F.'s final contention that the court denied her the right to present evidence when it sustained the Department's objections to her cross-examination of social worker. F. wanted to ask the social worker whether she explained the concept of termination of parental rights to T. and whether T. understood that concept. The record shows that question had already been asked and answered. Hence, F. was not denied "due process" by the court's ruling precluding cross-examination to ask the same question.

B. *The section 366.26, subdivision (c)(1)(E) exception*.

The fifth exception to the adoption requirement based on the relationship between the child -- who is the subject of selection and implementation proceeding -- and his or

her siblings is found in section 366.26, subdivision (c)(1)(E). Thereunder, the court must order adoption unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child because "[t]here would be substantial interference with a child's sibling relationship. . . ."[3] F. argues this exception precluded termination of her parental rights because it would affect T. and D.'s relationship with their sibling R.

Application of the section 366.26, subdivision (c)(1)(E) exception is analogized to the exception under subdivision (c)(1)(A). (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 951-952.) Accordingly, subdivision (c)(1)(E) directs the juvenile court to balance the child's relationship with siblings against a permanent home. (*Id*. at p. 951.) The juvenile court weighs the benefit to the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster-home placement, against adoption, which is designed to confer security, belonging, and permanence. (*Ibid.*)

The juvenile court should determine whether terminating parental rights would substantially interfere with the sibling relationship. To do so, the court evaluates "the nature and extent of the relationship, including whether the child and sibling were raised in the same house, shared significant common experiences or have existing close and strong bonds." (*In re L. Y. L., supra*, 101 Cal.App.4th at p. 952, citing § 366.26, subd. (c)(1)(E).) If the court concludes terminating parental rights would substantially interfere with the sibling relationship, then it must "weigh the child's best interest in continuing that sibling relationship against the benefit the child would received by the

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[3] Subdivision (c)(1)(E) of section 366.26 states, "There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."

permanency of adoption. [Citation.]" (*Ibid.*) The parent carries the burden to show a substantial interference with a sibling relationship. (*In re L. Y. L., supra*, at p. 952.)

Given the state of sibling visitation here, we conclude the exception of section 366.26 subdivision (c)(1)(E) would not apply to prevent adoption. That is to say, termination of parental rights would have no effect on the boys' relationship with each other. Debra and Edna demonstrated by their actions, their commitment to continuing the relationship between T. and D. on the one hand and R. on the other hand. Since R. moved to Edna's house, the foster mothers have maintained frequent and ongoing visits between the siblings and facilitated regular telephone contact. Debra assured the social worker that she was willing to work with Edna to ensure that the siblings maintained contact. Therefore, the termination of parental rights will not interfere with this sibling relationship.[4]

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[4] As for A. the record supports the conclusion that the sibling exception to adoption would not apply. That is to say, neither T. nor D. have had contact with him in four years. A. is nonverbal and in a group home. He has not shared any common experiences with these boys for nearly four years, i.e., over half of T.'s life, and four-fifths of D.'s life.

DISPOSITION

The order is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.